

Application Serial No. 10/645,916

REMARKS/ARGUMENTS

Claims 1-16 are pending. Claim 1 is amended, and claims 15-16 are new.

Applicant notes with appreciation the Examiner's indication of allowability of the subject matter of claims 6 and 14. New claims 15-16 correspond to claims 6 and 14 rewritten in independent form.

The claims stand rejected as follows:

Claims	Rejection
1-5, 7 and 9-13	35 U.S.C. 102(b) as anticipated by Crum U.S. Patent 4,692,567
7-11 and 13	35 U.S.C. 103(a) as unpatentable over Robinson U.S. Patent 4,093,187

All rejections are thus respectfully traversed.

With regard to the rejection of claims 1-5, 7, and 9-13 based on the Crum patent, it is noted that the Crum patent does not describe or suggest a fence spacer having a spacer body that is substantially non-flexing. To the contrary, the strap described in the Crum patent is constructed to bow during use. Accordingly, withdrawal of the rejection under Section 102 (b) based on Crum is respectfully requested.

With regard to the rejection of Claims 7-11 and 13 as unpatentable under 35 U.S.C. 103(a) over Robinson (4,093,187), the Examiner has conceded in the Office Action that the Robinson reference fails to respond to the limitations in the claims that, among other things, **Robinson fails to disclose** a spacer having the required fourth wire retaining member. Notwithstanding this deficiency, the Examiner, citing In re Harza, 274 F.2d 669, 124 USPQ 378 (CCPA 1960) for the proposition that duplication of components of a prior art device, concludes that it would have been obvious to one having ordinary skill in the art at the time the invention was made to have a fourth wire retaining member configured as set forth in the claims.

However, there is no per se rule and rejections based on 35 U.S.C. Section 103(a) must rest on a factual basis. See, Ex parte Graneman, 68 USPQ2d 1219 (Bd. Pat.App & Interf. 2003). See also, Ex Parte Boris E. Makutonin, Frank G. Oliverio, and Matthew J. Zdinak, 2003 WL 23014547 (Bd. Pat.App & Interf. Jan. 21, 2003), citing, In re Warner, 379 F.2d 1011, 1017, 154 USPQ 173, 177-78 (CCPA 1967). Accordingly, in making such a rejection, the Examiner has the duty of supplying the requisite factual basis and may not resort to speculation, unfounded assumptions or hindsight reconstruction to supply deficiencies on the factual basis. Id.

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In this case, the examiner has failed to advance any factual basis to supply the admitted deficiencies of Robinson vis-a-vis the subject matter recited in the claims. Instead, the Examiner has attempted to bridge the evidentiary gaps of the Robinson reference by resort to a so-called mechanical rule of obviousness allegedly established by the Harza case. Such a rule does not exist and the reliance thereon by the Examiner to establish obviousness under Section 103 is improper. Id.

Moreover, the clips 18 of Robinson are not suitable to snap-fit onto the wires. Rather, they are described as being suitable to be crimped, as by pliers, into a clamped position 22 onto the wire. Col. 5, lines 46-56. Thus, in addition to the rejection having the foregoing deficiencies, the device of Robinson also fails to provide structure capable of accomplishing the required snap-fit function.

Accordingly, the rejections of the claims under Section 103 based on Robinson are unsustainable and withdrawal thereof is respectfully requested.

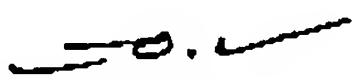
Applicant does not intend to surrender any range of equivalents under the Doctrine of Equivalents in regard to any claim limitation that appears in the final claims in any patent that may issue from this or any related application. Applicant expressly reserves the right to resort to the Doctrine of Equivalents for all limitations in regard to any future assertion of infringement of any claim, whether the limitation was present in an original claim or added by amendment a claim to or referenced in any argument to distinguish any claim from any prior art. All claims in any patent issued from this or any related application represent a statutorily presumed valid and patentable combination of structure and/or steps, and it is this combination which is presumed to patentably distinguish from the prior art, not any particular limitation of any claim.

Reconsideration and issuance of a notice of allowance is requested. In the event this response is not timely filed, Applicants hereby petition for the appropriate extension of time and request that the fee for the extension along with any other fees which may be due with respect to this paper be charged to our Deposit Account No. 12-2355.

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Respectfully submitted,
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*** CERTIFICATE OF FACSIMILE TRANSMISSION ***

I hereby certify that this correspondence is being facsimile transmitted to the Patent Office on the date shown below to Fax No. 703-872-9306, Examiner Michael P. Ferguson, Group Art Unit 3679.

September 20, 2004
Date


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